

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TERRENCE MOORE,

Plaintiff,

v.

Civil No: 2:09-CV-14668
HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT COURT

PETER J. ELLENSON, et. al.,

Defendants.

OPINION & ORDER OF SUMMARY DISMISSAL

I. Introduction

Terrence Moore, ("Plaintiff"), presently confined at the Chippewa Correctional Facility in Kincheloe, Michigan, has filed a *pro se* prisoner civil rights complaint pursuant to 42 U.S.C. § 1983.¹ For the reasons stated below, the complaint is dismissed for failing to state a claim upon which relief can be granted.

II. Complaint

Plaintiff claims that he was charged with murder in Ferndale, Michigan and was tried and convicted for this offense in the Oakland County Circuit Court. Plaintiff alleges that his court-appointed trial counsel, Todd A. Fox, provided ineffective assistance of counsel during pre-trial and trial proceedings. Plaintiff further alleges that Peter

¹ When plaintiff filed this lawsuit, he was incarcerated at the Kinross Correctional Facility, but has since been transferred to the Chippewa Correctional Facility. The Court obtained this information from the Michigan Department of Corrections' Offender Tracking Information System (OTIS), which this Court is permitted to take judicial notice of. *See Ward v. Wolfenbarger*, 323 F. Supp. 2d 818, 821, n. 3 (E.D. Mich. 2004).

Ellenson, his court-appointed appellate counsel, provided ineffective assistance of counsel on plaintiff's appeal of right.

Plaintiff now sues the defendants for malpractice and seeks monetary damages.

III. Standard of Review

Plaintiff has been allowed to proceed without prepayment of fees. See 28 § U.S.C. 1915(a); *McGore v. Wrigglesworth*, 114 F. 3d 601, 604 (6th Cir. 1997). However, 28 U.S.C. § 1915(e)(2)(B) states:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that:

(B) the action or appeal:

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

A complaint is frivolous if it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also Denton v. Hernandez*, 504 U.S. 25, 32 (1992). "A complaint lacks an arguable basis in law or fact if it ... is based on legal theories that are indisputably meritless." *Brown v. Bargery*, 207 F. 3d 863, 866 (6th Cir. 2000)(citing *Neitzke*, 490 U.S. at 327-28). A complaint fails to state a claim "if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Brown*, 207 F. 3d at 867. *Sua sponte* dismissal is appropriate if the complaint lacks an arguable basis when filed. *McGore*, 114 F. 3d at 612.

A *pro se* litigant's complaint is to be construed liberally, *Middleton v. McGinnis*, 860 F. Supp. 391, 392 (E.D. Mich.1994)(citing *Estelle v. Gamble*, 429 U.S. 97, 106

(1976)); that is, they are held to a “less stringent standard” than those drafted by attorneys. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Such complaints, however, must plead facts sufficient to show a legal wrong has been committed from which plaintiff may be granted relief. Fed.R.Civ.P. 12(b); *Dekoven v. Bell*, 140 F. Supp. 2d 748, 755 (E.D. Mich.2001).

To establish a prima facie case under 42 U.S.C. § 1983, a civil rights plaintiff must establish that: (1) the defendant acted under color of state law; and (2) the offending conduct deprived the plaintiff of rights secured by federal law. *Bloch v. Ribar*, 156 F. 3d 673, 677 (6th Cir. 1998) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). “If a plaintiff fails to make a showing on any essential element of a § 1983 claim, it must fail.” *Redding v. St. Eward*, 241 F. 3d 530, 532 (6th Cir. 2001).

IV. Discussion

Plaintiff’s suit against his court appointed attorneys must be dismissed because it fails to state a claim upon which relief can be granted under 42 U.S.C. § 1983. Court appointed attorneys or public defenders performing a lawyer’s traditional functions as counsel to a criminal defendant do not “act under color of state law” and are therefore not subject to suit under 42 U.S.C. § 1983. *Polk County v. Dodson*, 454 U.S. 312, 317 (1981). Even though the defective performance of a criminal defense attorney may cause the legal process to deprive an accused criminal defendant of his liberty in an unconstitutional manner, the lawyer who may be responsible for the unconstitutional action does not act under the color of state law within the meaning of § 1983. See *Briscoe v. Lahue*, 460 U.S. 325, 329, n. 6 (1983); See also *Elrod v. Michigan Supreme*

Court, 104 Fed. Appx. 506, 508 (6th Cir. 2004)(criminal defense attorney was not state actor subject to liability under § 1983 when there was no showing that attorney acted in concert with state officials to deprive client of his rights); *Bomer v. Muechenheim*, 75 Fed. Appx. 998, 999 (6th Cir. 2003)(criminal defendant's appellate attorney was not state actor, and thus was not subject to suit under § 1983); *Dunning v. Yuetter*, 12 Fed. Appx. 282, 284 (6th Cir. 2001)(criminal defense attorneys did not act under color of state law, for purpose of § 1983).

Because a court appointed attorney does not act under the color of law, a defendant cannot maintain a § 1983 action against counsel based on a claim of ineffective assistance of counsel. See *Copus v. City of Edgerton*, 959 F. Supp. 1047, 1052 (W.D. Wis. 1997); *mod on other grds* 151 F 3d 646 (7th Cir. 1998); *Cf. Cudejko v. Goldstein*, 22 Fed. Appx. 484, 485 (6th Cir. 2001)(state court criminal defendant's private attorney was not "state actor," precluding defendant's § 1983 action against attorney alleging ineffective assistance of counsel).

V. CONCLUSION

IT IS HEREBY ORDERED that plaintiff's complaint is **DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**, pursuant to 28 U.S.C. § 1915A(e)(2) and 28 U.S.C. § 1915(A).

Dated: May 12, 2010

S/Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

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I hereby certify that a copy of the foregoing document was served upon counsel of record on May 12, 2010, by electronic and/or ordinary mail.

S/Catherine A. Pickles

Judicial Secretary